IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2694 OF 1985

1. The Manmad St.Xavier's Society,
Manmad, District Nasik,
2. Fr.Alex Colaco of Nasik ... Petitioners

versus

1. The State of Maharashtra,
2. The Secretary to Govt.,
Education & Employment Dept.,
Mantralaya Annexe, Bombay,
3. The Presiding Officer,
Schools Tribunal, Nasik,
4. Philip D. Ubale ... Respondents

...

Mr.Randive i/by Mr. Owen Menezes for the Petitioners.

Mr.K.V. Saste, A.P.P., for the Respondents Nos.1 and 2.

Ms.Nandini Gupta i/by Mr.M.P.Vashi, for Respondent No.4.

Respondent No.3 is formal party.

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CORAM : A.M.KHANWILKAR,J.

30th March 2005

ORAL JUDGMENT :

1. This petition under Article 227 of the Constitution of India takes exception to the decision of the Schools Tribunal, Bombay, dated June 7, 1985, in Appeal No. GEN/NAS/5 of 1983. By the said order, the Tribunal has set aside the order of termination passed by the Petitioners against Respondent No. 4 dated 22nd February 1983 and ordered reinstatement of Respondent No.4 to the same post, which he was holding at the relevant time, and requiring the Petitioners to pay arrears of emoluments, including pay and allowances as due and payable to him from 1st March 1983 till the date of his reinstatement.

2. By this petition, the Petitioners originally challenged the validity of sections 8 and 13 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "the Act") and Rules 28 to 33 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules,

1981 (hereinafter referred to as "the Rules") being violative of Articles 14, 19 and 30 of the Constitution of India, or, in the alternative, for declaration that the said provisions are not applicable to the Minority Institutions. In addition, the Petitioners questioned the correctness of the decision of the Tribunal, which is impugned herein. Insofar as the grounds regarding validity of the provisions of the Act and the Rules and/or application thereof are concerned, those grounds are not pressed before me. Counsel for the Petitioners fairly accepts that those grounds are not available to the Petitioners in view of the recent decision of the Apex Court and that the Petitioners would not press the said grounds. In other words, the only question that needs to be considered is : Whether the decision of the Tribunal, setting aside the order of termination passed by the Petitioners and directing reinstatement of Respondent No.4 with consequential benefits, can be said to be appropriate or otherwise ?

3. Respondent No. 4 was working as Assistant Teacher at the relevant time in St.

Xavier's High School, run by the Petitioners. On 31st July 1982, when a programme was going on in the school, Respondent No. 4 allegedly misbehaved with the Head Master in the presence of other staff members, who had gathered for the said programme. In the context of that episode, show cause notice was given to Respondent No. 4 by the Manager of the School on 2nd August 1982 calling upon Respondent No. 4 to remain present before the School Committee on 3rd August 1982 to show cause why disciplinary action should not be taken against him. In response to the said show cause notice, Respondent No. 4 sent reply on 3rd August 1982 asserting that the said notice was based on misunderstanding, vague record and it violates the provisions of the said Rules. Respondent No.4 called upon the Manager to withdraw the said notice. By the same reply, Respondent No. 4 requested the Manager of the School to inform him the names of all the Members of the Management and the School Committee. In response, the Manager sent communication dated 3rd August 1982 to the Respondent No.4, which, according to the Petitioners, was show cause notice in terms of Rule 32 of the said Rules. By

this communication, the Manager of the School called upon Respondent No. 4 that inspite of opportunity, he has failed to offer any explanation to the School Committee. Accordingly, Respondent No. 4 was called upon to submit his written explanation regarding the event that took place on 31st July 1982, on or before 16th August 1982 as communication sent by Respondent No. 4 dated 3rd August 1982 was found to be unsatisfactory. It was made clear in this communication that if no written explanation is forwarded, necessary action will be taken in accordance with the said Rules. After receipt of this communication, Respondent No. 4 sent a detailed reply dated 13th August 1982. Respondent No. 4 asserted that from 1974 onwards, he has had difference of opinion on religious and social as well as personal grounds with the Priest of the Institute, Mr. Y.W. Amolik, who was taking leading part in the activities of the Institute. It is further stated that Respondent No. 4 abandoned Catholic Faith and stopped attending Church, for which reason the Priest conspired to throw him out from the School and from that period, deliberate

mental and financial torture was inflicted on him to spoil his record. It is then alleged that the Supervisor Fr. Alex conspired with the Principal, Fr. Henriques and started an illegal inquiry against Respondent No. 4 in 1976 and proceeded to terminate him, which was an unsuccessful attempt. Being agitated by failure to terminate Respondent No.4, the Priest, with the assistance of Mr. and Mrs. Amolik, started pressurising Respondent No.4 and his family in many ways. It is then alleged in the response that in 1979, those persons ignored the seniority of Respondent No.4 and attempted to declare him as surplus. It is also alleged that the Principal tried his level best to pressurise the other staff members to extend their support to him against Respondent No.4. It is then alleged that many institutions published pamphlets alleging malpractices indulged in the school. Reference is made to publication by the Editor of Deshdut in this behalf. It is alleged that those allegations went unchallenged. It is also alleged that the staff members were acting under the pressure of the Principal against the interest of Respondent No.4 and went to the

extent of signing circulars under pressure. It is stated that as the Respondent No. 4 was reinstated, the anger against Respondent No. 4 was precipitated. It is alleged that the Principal filed a false criminal action against the Respondent No.4 and openly claimed that he would prefer to close down the school, but not allow Respondent No. 4 to report for work. It is alleged that false accusations were made in the criminal case against Respondent No.4 and his wife, which allegations were decided by the Criminal Court and eventually, Respondent No. 4 was acquitted of the same by the appellate Court. It is also alleged in this response that the son of Respondent No. 4 was manhandled and no inquiry was held in that behalf. In this context, it was stated that the Respondent No. 4 had reason to believe that the Principal was responsible for that situation. It is then stated that complaint has been filed against the Principal by Respondent No. 4 in the Labour Court in regard to the fourth instalment of C.D.S. and another complaint against Father and Mr. Amolik in the Court for the defamation of Respondent No. 4 and his wife. It is then

alleged that the Principal made irresponsible statements about the behaviour of the Respondent No. 4 amongst the teachers, which aspect ought to be taken note of. It is then alleged that false accusations are made in the letter, which has been signed under the pressure of the Principal in respect of episode of 31st July 1982. In fact, the Respondent No. 4 was not present in the function of the teachers. At the end, it is emphatically stated by the Respondent No. 4 that the proposed inquiry against him was not only illegal, but was initiated with mala fide intention of spoiling his record. On receipt of this communication, the Manager of the School sent letter purported to be notice dated 18th August 1982 to the Respondent No.4. During the course of arguments, Counsel for the Petitioners suggested that this communication was in compliance of Rule 37 of the said Rules. That aspect will be dealt with a little later. For the nature of stand taken, I think it apposite to reproduce the said communication in its entirety.

" St.Xavier's High School
Manmad.
18-8-1982.

Shri P.D. Ubale,
St.Xavier's High School,
Manmad.

Sub.: Submission of explanation in reply to your allegations.

Ref.: Your letter dated 13-8-1982

1. In your letter dtd.13-8-1982, you have made certain serious allegations against the institution, the principal and some of the teachers.

2. You are hereby informed that you should prove in writing all the allegations contained therein with supporting evidence in respect of each allegation within seven days from the receipt hereof by you.

3. In case you are not able to substantiate your allegations within 7 days we will take necessary action according to the rules.

Yours faithfully,
Sd/- Manager."

In response to this communication, Respondent No. 4 wrote to the Manager of the School on 23rd August 1982 that all the allegations made by him and as contained in his letter dated 13th August 1982 are true and correct and he would submit proof in support thereof at the appropriate time. Thereafter, the inquiry proceeded against the Respondent No. 4 by framing four charges. The

substance of the charges framed at the inquiry reads thus :

> (1) The employee with the help of his wife and others conspired to attack the Head Master on 27-7-1979 to have him falsely charged for outrage of modesty.
>
> (2) Attempt on the part of the employee to defame members of the Management, Head Master and some members of the staff through false accusations.
>
> (3) Grave misconduct and insult of Head Master and staff members on 31-7-1982.
>
> (4) False allegations by employee against the Management, Head Master and some members of the Staff in his letter dated 13th August 1982 and false denial of his presence at the function on 31-7-1982.

The inquiry proceeded further culminating with the finding recorded by the Committee holding that all the charges have been proved against the

Respondent No.4. However, the Committee recommended termination of service only in respect of charges Nos.1, 2 and 4 as it observed that the Charge No. 3 invited minor penalty. Acting on the basis of the said recommendation, the Management proceeded to issue order of termination on 22nd February 1983, which was to come into effect from 1st March 1983. After the said order was served on the Respondent No.4, the same was challenged by the Respondent No. 4 before the Schools Tribunal, Bombay, by way of appeal under section 9 of the Act. The Tribunal has summarised the gravamen of the grievance of the Respondent No. 4 and the basis on which the order of termination was put in issue, in para 2 of the judgment under challenge. The relevant portion of the said para reads thus :

> " . . . It is contended that the Appellant was not suspended during the period of enquiry which will go to show that the charges alleged were not of a serious nature. It is, therefore, contended that it was not necessary to form the enquiry committee against the Appellant. It is then pointed out that the charge sheet was issued by the Respondent in the capacity of 'Adhyaksha, Enquiry Committee' which is against the provisions of Rule 37(1) of the Rules,

1981. It is also pointed out that the charge sheet contains 4 allegations while the show cause notice previously issued contained only one charge. Therefore, it is pointed out that the Appellant has got the opportunity to explain only one charge. It is, therefore, contended that the enquiry committee has no right to proceed on the illegal charge sheet which contained additional 3 charges and the Appellant was not given any opportunity to defend himself. It is pointed out that the so called charge No.1 regarding the physical assault has already been decided by Judicial Magistrate, Manmad and the Writ Petiiton No.(Cri) 7516 of 1981 in connection with the said decision of the Manmad Court has already been summarily rejected by the Hon'ble High Court at Bombay. It is contended that the ruling of the High Court is binding to all to enquire the first charge, i.e. Charge No.1. As regards the charge No.2 the Appellant has pointed out that the different associations published a booklet containing charges of corrupted affairs relating to the institution. It is pointed out that the Appellant was not concerned with the matter. It is contended that there was a special working committee for the said publication in which the Appellant was not a party. The Appellant being a secretary of the Secondary Teachers' Association signed the Booklet on behalf of the Association and not as an Assistant Teacher of the School. Therefore, it is contended that he cannot be called for enquiry on charge No.2 because it is neither connected with school working nor mentioned in Rule 28(5). It is pointed out that if the institution has really been defamed the management would have gone in the Court of Law against the publishers of the booklet. It is alleged that the management unnecessarily tried to blame the Appellant for the same. Then as regrds the Charge No. 3 and 4, it is

pointed out that the incident alleged in the said charges took place in the private ceremony of the institution. The ceremony was connected with the Hon'ble St. Ignecias Layolakar whose name is not included in the National Patriots as per annexures 27 of the S.S. Code. It was purely a religiouis ceremony out of a school working time. The Appellant did not remain present as it was not the school function. It is pointed out that being angry with the Appellant for his absence the official made false charges on the Appellant with the help of other employees and compelled them to complaint against the Appellant. It is alleged that on the basis of that complaint, the School Committee punished the Appellant with stoppage of increment. It is pointed out that the charges Nos. 3 and 4 are not related with the school working, school and school function and, therefore, the School Committee has no right to interfere in the matter, similarly the Appellant has gone in an appeal to the Deputy Director of Education against the punishment based on charge No. 3 and 4. It is pointed out that as the matter is under consideration of the Dy. Director of Education the enquiry committee has no right to interfere the same again. The Appellant then pointed out that the representative on the enquiry committee on behalf of the Management, Fr. Oscar Rozario, is himself executive officer of the management; that he has issued a show cause notice and charge sheet to the Appellant, therefore, being the complainang officer, he cannot be a member of the Enquiry Committee. It is contended that it is against the natural justice that who alleged, he himself adjudicates. It is pointed out that the Respondent is the authority to appoint, dismiss etc. the employees, whose witnesses are taken before him cannot be acceptable. It is also pointed out that the Appellant has gone in an appeal

against him, being Chairman of the School Committee. It is contended that Fr. Oscar Rozario cannot be a member of enquiry committee; that his presence as an enquiry officer stands there a great obstacle in establishing the natural justice. It is then pointed out that upo 20-12-1982 Fr. Alex Colase, the Head of the School was the nominee of the School Committee on the Enquiry Committee in contravenion of the Ruling of the Hon'ble High Court of Bombay and from 29-12-1982 Br. Misquitta was introduced in Enquiry Committee in place of Fr. alex Colase. It is contended that the Appellant has objected to his representation stating that he was never a member of the school committee. It is also pointed out that the management did not provide the Appellant with the list of the members of the School Committee and the management hence the presence of Br. Misquitta in the enquiry committee is illegal and the proceedings of the enquiry committee is unlawful. The Appellant also challenged the constitution of the School Committee. It is also pointed out that the meeting of the enquiry committee should have been caled by the Convener but on 26-10-1982 and 20-2-1983 the meetings were called by the Manager. According to the Appellant it is breach of rule and hence the working of these meetings become illegal. It is then pointed out that the working of the enquiry committee was continued on holidays against the objection of the Appellant and it is therefore the breach of the Rule 36(6) of the Rules, 1981. It is also pointed out that the meeting on 24-1-1983 should have been adjourned because the representative of the Appellant had to go to Delhi to attend the admission of his own case but the Convener without adjourning conducted the meeting for consecutive three days i.e., 24, 25 and 26 January 83 in the absence of the Appellant and his representative. Hence it is contended that the working of the Enquiry committee is illegal. The

Appellant has challenged the proceedings of the enquiry committee on the various ground and also contended that the enquiry committee has no right to enquiry into the personal and private matters. It is pointed out that the witnesses presented before the enquiry committee are not mainly eye witnesses but the ear witnesses which are not acceptable by law. It is also pointed out that the Appellant was not allowed to cross-examine the persons who signed the complaints against him as some of the employees were on casual leave on the same day. It is pointed out that the management tried to terminate the services of the Appellant twice in 1976 and in 1979 and so this enquiry has been done by prejudiced mind. It is pointed out that the Appellant had made many complaints against the Headmaster but the management did not take any cognizance. It is alleged that on a single complaint of the teachers and the Headmaster, the Management framed a charge sheet and harassed the Appellant. According to the Appellant it is the violation of the principles of natural justice. It is alleged that the management has interferred in the family affairs of the Appellant and tried to harass him in family life and also issued false memos. It is contended that the allegations are based on the religiouis differences. According to the Appellant he is a protestant Christian and the Respondent nd the officials of the management are Roman Catholics; that the Appellant does not use to go to the Roman Catholic Church and therefore the management wants to harass the Appellant by terminating his services. It is also pointed out that some of the students beat the son of the Appellant in the school premises and due to the bearing he became a patient of feats. It is further contended that the Appellant requested the Headmaster to enquire the matter but he purposely avoided to do any inquiry. It clearly

> shows the prejudiced mind against the Appellant. It is pointed out that all the allegations made against the Appellant are not related with the school working and are not mentioned in Rule 28(5). It is pointed out that the teaching and the working of the Appellant is so good that there is no any adverse remark in his confidential report. Therefore, it is contended that the enquiry made against the Appellant is quite illegal, mala fide, bias and against the principles of natural justice. . . ."

The stand taken on behalf of the Management to justify the order of termination on merits is adverted to by the Tribunal in para 5 of the impugned judgment. The Tribunal, after considering the rival position and on the basis of materials on record, took the view that the action against the Respondent no. 4 was replete with mala fide. It has also noticed serious irregularities committed by the Management in the conduct of the enquiry which, in its opinion, vitiated the entire action. It is observed that the four charges framed against the Respondent No. 4 were never indicated to the Respondent NO. 4 in the show cause notice, but have been framed without giving opportunity to the Respondent No.4 to explain the same and , more so, on the basis

of the reply given by the Respondent No. 4 on 13th August 1982 in response to the so-called show cause notice dated 3rd August 1982. While dealing with the respective charges, the Tribunal noted that insofar as the first charge is concerned, the Respondent No. 4 was already tried and acquitted by the competent Criminal Court decided on 20th January 1981, as a consequence of which the Respondent No. 4 came to be reinstated and, therefore, the same ground could not be once again made basis to take disciplinary action against the Respondent No.4. The Tribunal then observed that the evidence to support the allegation in charge No. 1 was unsatisfactory. It further observed that in any case as the Management had already considered the said charge earlier and termination based on the said charge was withdrawn and the Respondent No. 4 reinstated, the enquiry on the basis of same ground could not be permitted. Insofar as the second charge is concerned, the Tribunal noted that the Respondent NO. 4 has signed the "Arop Patrika" not as an Assistant Teacher, but as Secretary of the Union. The article was not written by the Respondent No. 4. The Tribunal

took the view that the act of the Respondent No. 4 signing the "Arop Patrika" as Secretary of the Union cannot be termed as an act of misconduct in terms of Rule 28(5)(a) of the said Rules. Moreover, the said "Arop Patrika" was published or came into existence some time in 1979 and no remedial steps were taken by the Management since then. The Tribunal further noted that the "Arop Patrika" was published by the Samiti with which the Respondent No. 4 had no concern as he was not member of the said Samiti (Committee). The Tribunal further observed that this charge has been invoked by the management only after receipt of the reply sent by Respondent No.4 dated 13th August 1982 and that too without giving an opportunity to the Respondent No.4 to explain why such a charge should not be framed against him. Insofar as charge No. 3 is concerned, the Tribunal held that as it was expected of the management that the said charge deserved only minor punishment and that punishment was already inflicted on Respondent No. 4; and as the same (order of punishment) which was already subject matter of challenge before the appellate authority, the same was of no avail. Insofar as

charge No. 4 is concerned, the Tribunal has opined that even that charge was the outcome of the reply given by Respondent No. 4 to the so-called show cause notice dated 3rd August 1982 by a letter dated 13th August 1982. The Tribunal has held that it was absurd to make out a case of misconduct on the part of Respondent No. 4 on the basis of explanation given by him to the show cause notice. It then observed that no opportunity to explain as to why such a charge should be framed and proceeded with was given to the Respondent No. 4. It further observed that the evidence about the presence of the Respondent No. 4 at the meeting held on 31st July 1982 was doubtful, as witnesses did not depose as to what was the role played by the Respondent No. 4 in the said meeting. It also noted that the teachers who were not present in the said meeting had also initially complained, obviously under the pressure of the principal.

4. After dealing with the merits of the charges independently, the Tribunal went on to observe that the enquiry against the Respondent No. 4 was vitiated because of the serious

irregularities. It has noticed that Fr. Rozario, the Manager, had given two notices to the Respondent No. 4 and he himself was the member of the enquiry committee as nominee of the management of the school. His participation in the enquiry committee vitiated the proceedings. The Tribunal has then noted that another person, who was member of the enquiry committee till acceptance of his resignation, Fr. Alex, appeared as witness in the same case against the Respondent No. 4. Even that vitiated the enquiry against Respondent No. 4. The Tribunal then observed that names of members to be appointed on the enquiry committee were not furnished to the Respondent No. 4 nor the names of the witnesses, who were to be examined was furnished. Besides, the enquiry proceeded in absence of the nominee of Respondent No. 4. For all these reasons, the Tribunal allowed the appeal preferred by the Respodent No. 4 setting aside the order of termination dated 22nd Febraury 1983 and directing reinstatement of Respondent No. 4 with consequential benefits. The above decision is the subject matter of present writ petition.

5. According to the Petitioners, the approach of the Tribunal is manifestly wrong. It is argued that the Tribunal has proceeded on the assumption of facts, which are error apparent on the face of the record. It is also argued on behalf of the Petitioners that the conclusion reached by the Tribunal about failure to observe principles of natural justice cannot be sustained either in fact or in law. According to the Petitioners, they have followed all the necessary requirements during the conduct of the enquiry. It was argued that the Tribunal in any case has exceeded its jurisdiction in evaluating the evidence on record, which was beyond the scope of appeal before the Tribunal. It was also argued that presence of the stated memebrs of the enquiry comittee was because of necessity; and if it is so, their participation will not vitiate the enquiry, as is the view taken by the Tribunal. According to the petitioners, the finding recorded by the Tribunal, much less the conclusion reached, cannot be supported either on fact or in law. To buttress the above submissions, reliance was placed on the decisions

of the Apex Court reported in (1) A.I.R. 1977 S.C. 965 - The Chairman, Board of Mining Examination and Chief Inspector of Mines and another v. Ramjee (paras 12 and 13); (2) A.I.R. 1979 Kerala 120 - M. Madhavan Pillai v. K.A. Balan and others (FB), paras 3, 4 and 5; (3) A.I.R. 1992 S.C. 248 - Union Carbide Corporation, etc., etc. v. Union of India, etc., etc. para 79; (4) 1997 (3) Mh.L.J. 235 - Kashiram Rajaram Kathane v. Bhartiya R.B. Damle Gram Sudhar Tatha Shikshan Prasar Society and others, paras 4 to 7 and 12; and (5) 1997 (3) Mh.L.J. 709 - Thapar Education Society and another v. Shyam Maroti Bhasarkar and others, paras 14 to 28.

6. On the other hand, Counsel for the Respondent No. 4 supported the conclusion reached by the Tribunal and adopted the reasons recorded by the Tribunal as his arguments.

7. It is relevant to note that during the pendency of this petition, because of the interim stay granted by this Court on 23rd July 1985, the Respondent No. 4 could not be reinstated in

service. In the meantime, however, the Respondent No.4 has attained the age of superannuation. This Court had directed the Petitioners to deposit all the backwages, which direction has been complied with by the Petitioners.

8. As mentioned earlier, the grounds regarding the validity and/or application of the provisions of the Act and the Rules are not pressed by the Petitioners before this Court and have confined the challenge only to the order of the Tribunal on merits.

9. Having considered the rival submissions, the position which emerges from the record is that action against the Respondent No. 4 was taken even in the past which attempt was, however, unsuccessful. The Respondent No. 4 happened to be office bearer of the employees' union. Obviously, there were differences between the Respondent No. 4 and his superiors, who were in commanding position. The Respondent No. 4 was acquitted by the Criminal Court of the accusations made against him by his superiors.

As a consequence of acquittal by the Criminal Court, on 20th January 1981, in Criminal Case No. 1902 of 1980, decided by the High Court of Bombay, Respondent No. 4 was reinstated in service by the Management. Soon after reinstatement, Respondent no. 4 has been embroiled in a controversy pertaining to episode of 31st July 1982. That episode, however, has been considered by the management and treated as deserving minor punishment, which decision is already pending challenge in appeal; but, on the basis of communication exchanged between the management and the Respondent No.4, pursuant to show cause notice received by the Respondent No.4, that has been made basis for proceeding against Respondent No. 4. The four charges which are drawn and for which Respondent No. 4 was tried, mostly pertain to matters which were already considered. However, to justify the action for initiating disciplinary enquiry against the Respondent No. 4 on the basis of his letter dated 13th August 1982, even those charges came to be framed along with charge No. 4. Going by the sequence of events and the manner in which the disciplinary action commenced against

the Respondent No. 4 gives an impression that the Respondent No. 4 was being persecuted. The person who issued show cause notice was the member of the enquiry committee as nominee of the management of the school. Besides, another member of the committee, at some stage, but later on resigned, stepped into the witness box to depose against the Respondent No. 4. The fact that he had first resigned and then deposed against the Respondent No. 4 will make no difference if the totality of the circumstances is taken into account. It is common ground that the enquiry was proceeded in absence of the representative of the Respondent No. 4. Indeed, justification has been offered that the date on which the proceedings were continued was the adjourned date and absence of the representative of the Respondent No. 4 could have been a ground for declining to defer the enquiry. Even so, when examined on the touchstone of principles of fairness and the totality of circumstances, emerging from the record, even this grievance is a serious one, because it is not the case of the Petitioners that deferring the enquiry by three days as was requested would have been

impermissible in law. One cannot be oblivious of the fact that the institutions (schools) such as that of the Petitioners are managed by close-knit group of persons under strong leadership of some one like a fortress, unlike impersonal approach in a Governmental organisation or institution. In such institutions, like the ones of Petitioners, personal bias of the leader or the person having say with the close-knit group of persons in the management is bound to influence the decision making process or to facilitate removal of an inconvenient employee. In the present case, there are strong circumstances to suggest that Respondent No.4 has been persecuted. The allegations of biased action against the Respondent No.4 will have to be viewed in the totality of the circumstances. In my opinion, therefore, no fault can be found with the opinion recorded by the Tribunal that the action against the Respondent No. 4 suffered from the vice of bias and replete with mala fide. With this finding, the entire proceedings are vitiated in the eye of law.

10. To get over the above position, the

Counsel for the petitioners relied on the decision in the case of M. Madhavan Pillai (supra) and Thapar Education Society (supra). Indeed, the legal position stated in those decisions cannot be disputed. But, for examining whether it is a case of bias in fact or bias in law, the circumstances on record of every case ought to be considered. Suffice it to observe that the fact that the member of the enquiry committee had himself issued show cause notice to the Respondent No. 4 which fact is not in dispute, is fatal. For, the person, who is a prosecutor, automatically incurs disqualification to be a Judge in the same cause. It was, however, submitted that the participation of Fr. Roserio in the enquiry committee will have to be considered as proper, applying the doctrine of necessity. The doctrine of necessity will have no application, because the appointment of Fr. Roserio as nominee of the management during the enquiry is not on account of any statutory requirement - that the manager of the school should be appointed as representative of the management on the enquiry committee. In other words, the management had option to appoint some

other person as nominee of management on the enquiry committee. If it is so, the doctrine of necessity has no place. Besides, the issue as to whether principles of natural justice have been excluded by the doctrine of necessity came up for consideration before this Court whilst dealing with matter under this very Act, in the case of Kashiram Rajaram Kathane (supra); and that plea has been negatived after considering the line of decisions referred to in the said judgment as can be discerned from para 12 thereof. That judgment also refers to Rattan Lal's case reported in A.I.R. 1993 S.C. 2155. Wherein the Apex Court held that the test is not whether in fact bias has affected the judgment; the test is always and must be : whether a litigant can reasonably apprehend that bias attributable to a member might have operated against him in the official decision. It is well-established that justice must not only be done, but must also appear to be done. Interestingly, in the said case before the Apex Court, bias in departmental enquiry was attributed on the ground that the member of the enquiry committee had appeared as witness against the delinquent. It was found that bias of such

member percolates throughout the enquiry proceedings. In the present case, Fr. Alex was appointed as member of the enquiry committee. He has subsequently deposed as witness in the same enquiry against Respondent No. 4. Indeed, he appeared as witness only after he had resigned as member of the enquiry committee and his resignation was accepted by the management and in his place, Br.Dominique Misquitta was appointed as Convener. However, the Respondent No.4 can justifiably attribute bias because of the participation of Fr. Alex as well as Fr. Roserio which would percolate throughout the enquiry.

11. Be that as it may, it is obvious from the record that the incident of 31st July 1982 was used as a facade to initiate action of termination against Respondent No. 4. The communication was sent to the Respondent No. 4 purported to be show cause notice on 2nd August 1982. As the explanation offered by the Respondent No. 4 was not found satisfactory, another show cause notice was issued on 3rd August 1982 purported to be under Rule 32. In

response to the said notice, the Respondent No. 4 sent communication on 13th August 1982. Insofar as the incident of 31st July 1982 is concerned, the act of omission or commission of the Respondent No. 4 was considered by the competent authority and minor punishment has been imposed by following procedure under Rule 32. Once that decision was taken, the matter ought to have ended at that. But, instead, the same was precipitated on the basis of reply given by the Respondent No. 4. Interestingly, the Respondent No. 4 was called upon to substantiate the allegations contained in the said communication dated 13th August 1982 by the manager of the school vide letter dated 18th August 1982. The same has been extracted in its entirety in the earlier part of this judgment. According to the Petitioners, this communication was in conformity with the procedure for enquiry for inflicting major penalties. In the first place, the procedure for inflicting major penalties can be deduced from Rule 33. Rule 33(1) lays down that the management shall "first decide" whether to hold an inquiry and also to place the employee under suspension. In the present case, the

Respondent No. 4 was not put under suspension. That, however, will make no difference. Rule 36 postulates that when the Management decides to hold an inquiry, it shall do so through a properly constituted enquiry committee. Sub-rule (1) of Rule 36 requires that the Chief Executive Officer authorised by the management shall communicate to the employee concerned by registered post acknowledgement due the allegations and demand from him a written explanation within 7 days from the date of receipt of statement of allegations. There is nothing on record to indicate that this requirement has been complied with in its letter and spirit. Reliance was placed on the communication dated 18th August 1982, which is reproduced above. However, that communication cannot assume the colour of communicating allegations calling upon the employee to offer written explanation, as was required by Rule 36(1). Besides, Rule 37 which provides for procedure of enquiry mandates that the management shall prepare a charge sheet containing specific charges. The said charges are to be formulated on the basis of explanation offered by the

employee to the statement of allegations provided to him under Rule 36 (1). In the present case, however, the management straightaway proceeded to frame charges on the basis of the reply given by the Respondent No. 4 in his letter dated 13th August 1982. Four charges which have been framed, the principal charges are founded on grounds which have already been considered on the earlier occasion. In substance, the procedural requirements under the Rules have been observed more in breach during the conduct of the enquiry against the Respondent No.4. That opinion of the Tribunal is reinforced from the record of the case.

12. Coming back to the charges as framed, Charge No. 1 is that Respondent No. 4 with the help of his wife and others conspired to attack the Head Master on 27-7-1979 to have him falsely charged for outrage of modesty. That aspect has already been considered by the Criminal Court culminating in acquittal of the Respondent no.4. Respondent No. 4 was, in fact, terminated on the basis of the said incident. However, was reinstated after his acquittal by the appellate

Court, which order was confirmed by this Court in Criminal Case No. 1902 of 1982, decided on 20th January 1981. The fact that Respondent No. 4 was reinstated in service is not in issue. It is argued on behalf of the Petitioners that even though the Respondent no. 4 was reinstated, that would not preclude the management to proceed against the Respondent no. 4 by way of disciplinary action inspite of his acquittal. This submission overlooks the provisions of Rule 33(6) of the said Rules. The purport of Rule 33(6) is that upon registration of acquital, the management had option either to reinstate the Respondent No. 4 or proceed with the enquiry. The said provision postulates that if the management agrees that the acquittal as justified, it may drop the enquiry by certifying that it agrees with the finding of the Court. Whereas, if it disagrees with the finding, it may proceed with the enquiry and inflict proper punishment. In the present case, the Respondent No. 4 was terminated and after order of acquittal, came to be reinstated. There is nothing on record to even remotely suggest, at least brought to my notice, that the management

decided to reinstate Respondent No. 4 without prejudice to the remedy of proceeding with the enquiry against the Respondent No. 4. There is nothing to show that soon after reinstatement, the management directed enquiry against Respondent no. 4. That episode, therfore, could not have been made ground for disciplinary action against the Respondent no.4 taking advantage of the recent episode of 31st July 1982. Moreover, the said allegation was not even remotely indicated to the Respondent No. 4 as was required by the provisions of Rule 33; whereas, the same found place in the charges framed against the Respondent no. 4. Viewed in this perspective, no fault can be found with the opinion of the Tribunal that the first charge could not have been the basis to take action against Respondent no. 4. The Tribunal has, however, also observed that the evidence in respect of this charge was unsatisfactory. It was vehemently argued on behalf of the Petitioners that the Tribunal exceeded the scope of appeal by entering into area of appreciation of evidence. To support this contention, reliance was placed on the exposition in the case

of Thapar Education Society (supra). However, it is not necessary for me to go into that aspect, because, in my opinion, the first charge framed against the Respondent No. 4 could not have been the basis to proceed against him in the fact situation of the present case.

13. Insofar as the second charge against the Respondent No. 4 is concerned, as attempting to defame members of the management, Head Master and some members of the staff through some accusations, the Tribunal has, in my opinion, rightly concluded that publication of some article by a committee of which Respondent No. 4 was not even a member could not have been made the basis to proceed against the Respondent No.4. The position that emerges from the record at best is that the Respondent No. 4 had signed the "Arop Patrika". However, he has signed the said "Arop Patrika" not in his individual capacity as Assistant Teacher, but as secretary of the union. The Tribunal has, therefore, opined that that could not be termed as an act of misconduct within the meaning of Rule 28(5)(a) of the said Rules. It is also rightly noted by the Tribunal

that the said Arop Patrika was published in 1979. No steps were taken thereafter by the management, but the same has been introduced as a ground to take action against Respondent No. 4 taking advantage of the episode of 31st July 1982. Moreover, no communication was sent to the Respondent No. 4 in respect of this allegation as was required in terms of Rule 33. It was argued on behalf of the Petitioners that even if there was no intimation to the Respondent No. 4 in respect of the subject allegation as was required by Rule 33, that would not vitiate the proceedings as no prejudice was to be caused to Respondent No. 4 who was to face the enquiry and had opportunity to effectively defend himself with regard to the said allegation. It was argued that natural jsutice is not an unruly horse, but what is to be considered is whether the procedure followed was fair and met with the substantial compliance. Reliance was placed on the observation in Chairman, Board of Mining Examination and Chief Inspector of Mines (supra) to support this contention. However, in my opinion, what has been glossed over by the Petitioners is that the Petitioners have made the

said allegation as ground for taking action against Respondent No. 4 only to suit their convenience. It is not the case of the Petitioners that the Respondent No. 4 was singularly responsible for the misinformation disseminated by the Arop Patrika issued in 1979. However, he had signed the same in the capacity of office bearer of employees' union. Besides, the publication of the said article was done by the committee of which Respondent No. 4 was not a member. That could not, therefore, have been the basis to proceed against the Respondent No. 4 in the enquiry instituted in 1982 that too straightaway framing charge without affording any opportunity to the Respondent No. 4.

14. Insofar as Charge No. 3 is concerned, even the Counsel for the Petitioners fairly accepted that the same will be of no avail to test the justness of the order of termination; because that pertains to episode of 31st July 1982 in respect of which after enquiry, the management decided to inflict minor punishment, which decision is pending in appeal before the appellate authority. It is, therefore, not

necessary for this Court to go into the appropriateness of the said charge, as has been rightly observed by the Tribunal as well.

15. Insofar as charge No. 4 is concerned, it is founded on allegation that Respondent No. 4 made false allegations against the management, head master and some members of the staff in his letter dated 13th August 1982 and false denial of his presence at the function of 31st July 1982. In other words, the said charge deals with two different allegations. The first in respect of false allegations made by the Respondent No. 4 against the management, head master and some members of the staff in the letter dated 13th August 1982. The second allegation is in respect of false denial of his presence at the function of 31st July 1982. Taking the later allegation first, that pertains to episode of 31st July 1982. The Respondent No. 4 was called upon to show cause on 2nd August 1982. In response to the said show cause notice, Respondent No. 4 gave reply on 3rd August 1982, and since the authorities were not satisfied with the explanation, proceeded against Respondent No. 4

to inflict minor punishment under Rule 32. If the episode for which only minor punishment was found appropriate by the management - this, of course, is not an expression on the correctness of that decision one way or the other - the fact that the Respondent No. 4 falsely denied his presence at the said function cannot be the basis to inflict major punishment. The stand of the Respondent No. 4 in respect of the said episode is associated with Charge No. 3 and cannot be seggregated in the manner as has been done by the management, so as to frame a separate charge that too to inflict major punishment.

16. Insofar as the former allegation in Charge No. 4 is concerned, the Tribunal has rightly observed that the said charge is based on the reply given by the Respondent No. 4 to the show cause notice dated 3rd August 1982. If it is so, that could not have been made the basis for enquiry. Counsel for the Petitioners was unable to explain that, in law, the delinquent employee can be proceeded for major punishment on the basis of explanation given by him in the course of enquiry. The explanation offered by

the Respondent No.4 in response to the show cause notice which ignited the process of enquiry could not have been made the basis to frame the said charge. That too to inflict a major punishment. Assuming that false stand is taken in the course of enquiry, it is doubtful that it would attract major punishment. This is what has been observed by the Tribunal. Besides, the Tribunal has also observed that this charge has been framed without giving any opportunity to the Respondent No. 4 to explain as to why such a charge should not be framed, as required by Rule 33. Besides, the nature of grievance made in the letter dated 13th August 1982 was essentially that the Respondent No. 4 was being persecuted by his superiors. Therefore, In the course of enquiry, if such grievance is made by the delinquent employee, it is incomprehensible that the same can be treated as misconduct within the meaning of Rule 28(5)(a) of the said Rules or an act that would invite major penalty.

17. Taking overall view of the matter, in my opinion, no fault can be found with the conclusion reached by the Tribunal in setting

aside the termination order dated 22nd February 1983 passed against Respondent No. 4 and directing the Petitioners to reinstate the said Respondent with consequential benefits. Indeed, the question of reinstatement will not arise as the Respondent No. 4 has attained age of superannuation during the pendency of this petition. The order of reinstatement will have, however, to be maintained so as to grant all consequential benefits to the Respondent no. 4 on the notional basis that the Respondent No. 4 was in service till he attained the age of superannuation.

18. The last aspect that requires to be considered is whether the Petitioners should be liable to pay the amount to the Respondent No. 4 or to issue direction in terms of sub-section (3) of section 11 of the Act. In my opinion, as the termination order issued by the management suffers from the vice of bias and mala fide action, the question of issuing direction in terms of section 11(3) of the Act does not arise. That course could be adopted in cases where the termination order is required to be set aside

because of the error of judgment of the management or for such other ground, but in no case the Management can contend that it should not be burdened with the financial liability arising out of the order of reinstatement when the order of termination passed by it suffers from the vice of bias and malafide.

19. Accordingly, this petition fails. The same is dismissed with costs.

(A.M.KHANWILKAR,J.)